IN THE

United States Supreme Court

OCTOBER TERM 1974

No. 74-

THE LONG ISLAND RAIL ROAD COMPANY,

Petitioner,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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July, 1974

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INTERSTATE COMMERCE COMMISSION, *et al.*,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, The Long Island Rail Road Company ("LIRR"), prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Second Circuit entered November 7, 1973, reversing the judgment of the United States District Court for the Eastern District of New York, and from its order dated March 29, 1974, upon petitions for clarification, and its decision and judgment upon petition for rehearing entered May 1, 1974.[1]

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[1] The other respondents are United States of America, Ajayem Lumber Corp., Penn Central Transportation Co., Erie Lackawanna Railway Co., Lehigh Valley Railroad Co., John E. Farrell, Trustee of the Central Railroad Co. of New Jersey, and The Baltimore & Ohio Railroad Co.

Opinions Below

The opinions of the Court of Appeals are reported as *Ajayem Lumber Corp.* v. *Penn Central Transportation Co.* at 487 F.2d 179, 496 F.2d 21, and —— F.2d —— and with the judgments are set out in Appendix A at pages 17 to 36 The decision of the District Court is reported at 350 F.Supp. 111.

Jurisdiction

The judgment of the Court of Appeals granting the petition for rehearing, but adhering to the prior decision, was entered May 1, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Did the Court of Appeals err and frustrate the statutory purpose by holding that railroads acting in concert to impose an increase in rate levels of an individual carrier over its objections, thus unlawfully depriving such carrier of its absolute right of independent action guaranteed by Section 5a(6) of the Interstate Commerce Act (49 U.S.C. § 5b), are subject only to a token penalty, thereby encouraging a continuation of the unlawfully imposed rates?

2. Did the Court of Appeals err in denying to a carrier, unlawfully deprived of its right of independent action, the remedy provided by law and relegating it to a formula for damages which, by its very language, defies proof?

Statutes Involved

The statutes involved in this case are Sections 5a, 6, and 15 of the Interstate Commerce Act (49 U.S.C. §§ 5b, 6, and 15), and a regulation promulgated by the Interstate Commerce Commission pursuant to its authority under Section 6 (49 C.F.R. 1300.52(b)). The pertinent portions of such statutes and regulation are set out in Appendix B hereto at pages 37-44.

Statement of the Case

Railroads receive their compensation for performance of transportation service primarily from their "local" rates or their "divisions" of "joint" rates. On traffic which moves solely between points on its own line, the carrier collects its local rates. Where joint rates for transportation of freight over the lines of two or more railroads have not been agreed to by the involved carriers, the shipper pays a "combination" rate consisting of the sum of the local rates, and each carrier receives its published local rate as its division. Where joint rates have been agreed upon by the participating carriers or prescribed by the Interstate Commerce Commission ("Commission") pursuant to its powers under Section 15(1) or 15(3) (49 U.S.C. § 15(1), (3)), the shipper pays the joint rate, and the participating carriers receive agreed or prescribed divisions of such joint rates.

The problem arises when, as in this case, joint rates have been published and made effective without proper authority, that is, without: (a) agreement of all participating carriers or (b) prescriptive action by the Commission, after hearing, under Section 15(1) or 15(3). Section 6(7) of the Interstate Commerce Act (49 U.S.C. § 6(7)) provides that no railroad shall "charge or demand or collect or receive a greater or less or different compensation . . . than the rates, fares, and charges which are specified in the

tariff filed and in effect at the time . . ." Thus, the rates published in the effective tariff are the "legal" rates which the shipper must pay and the carriers must collect.

However, as this Court pointed out in *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370 (1932), the "legal" rates may not be "lawful" rates, and that is the situation in the case at bar.

Under Section 5a of the Interstate Commerce Act (49 U.S.C. § 5b), the railroads are granted immunity from the antitrust laws with regard to rate negotiations conducted pursuant to their rate-making agreements approved by the Commission. However, Section 5a(6) specifically guarantees each railroad party to such an agreement "the free and unrestrained right to take independent action either before or after any determination arrived at through such procedure," thus ensuring that each individual railroad would be able to protect its interest and those of its shippers by maintaining existing rate levels and declining to acquiesce or concur in proposed rate increases or decreases. As the Court of Appeals correctly found, LIRR's joint rates were increased over its objections and without its consent, and the unlawfully published rates deprived LIRR of its statutory right of independent action.

Section 5a does not provide a remedy for denial of a carrier's statutory right of independent action. However, pursuant to its power under Section 6, the Commission has prescribed rules and regulations, and the last sentence of Rule 52(b) of its Tariff Circular No. 20 (49 C.F.R. § 1300.52 (b)) requires that when a carrier has not lawfully concurred in a joint tariff, it may not accept earnings in accordance therewith, but must demand for the service performed its lawful earnings according to its lawful tariffs, that is, its local rates.

As provided for in Section 6(4) (49 U.S.C. § 6(4)), to avoid the necessity for the printing and filing of countless tariffs by individual carriers, LIRR along with other rail-

roads has given numerous powers of attorney and similar authority to various rate bureaus[2] and to other railroads to print, and file tariffs on its behalf. However, unless the provisions of Section 5a(6) are to be violated, the level of the rates contained in existing tariffs cannot, of course, be changed without the agreement of all participating carriers.

This case arose when the various rate bureaus, under instructions from the other railroads with which LIRR had existing joint rates, and with the approval of the Commission, in violation of the law, increased the joint rates to or from points on the LIRR without LIRR's consent and over its objections, effective November 18, 1969. Rule 52 (b) referred to above, as well as the Commission's decision in *St. Louis & O'Fallon Ry. Co.* v. *E. St. L. & S. Ry. Co.*, 81 I.C.C. 538, 541 (1923), provide that where joint rates are changed without proper authority, the non-concurring carrier must collect its local rates as its divisions of the unlawfully published joint rates. Accordingly, early in December, 1969, LIRR notified the other railroads it would start collecting its local rates as divisions of the unlawful joint rates.

After LIRR's announcement, the Penn Central and other railroads having direct connections with LIRR tried to require prepayment on all shipments destined to points on LIRR. When this ploy was blocked, they began refusing to tender revenue waybills to LIRR at the time cars were interchanged. When LIRR refused to accept cars without the usual revenue waybills, a stalemate resulted on December 14, 1969, with no cars being interchanged for destinations on the LIRR.

On December 16, 1969, one of the industries located on LIRR, the Ajayem Lumber Corp., brought an action in

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[2] In the proceedings before the District Court and the Commission, the Traffic Executive Association—Eastern Railroads ("TEA—ER") was used for illustrative purposes, but the unlawfulness was committed by virtually all rate bureaus and other railroads.

the United States District Court for the Eastern District of New York against Penn Central, its allies, and LIRR, seeking injunctive relief. At the same time, Penn Central and its allies filed a complaint against LIRR. After a stipulation to resume the interchange of traffic with a right to LIRR to retroactively adjust the divisions thereon, the District Court twice referred questions to the Commission for declaratory orders, on which the Commission ruled adversely to LIRR in Ex Parte No. 262 (Sub-No. 1), *Petitions for Declaratory Order—Rule 52 of Tariff Cir. No. 20,* 337 I.C.C. 247 and 337 I.C.C. 274. LIRR then brought a complaint as a third-party plaintiff to review the Commission's orders, naming the United States and the Commission as defendants. Despite the confession by the United States of error by the Commission, the District Court generally followed the Commission's rulings in its decision in *Ajayem Lumber Corp.* v. *Penn Central Transp. Co.,* 350 F. Supp. 111.

Before both the District Court and the Commission, the only question litigated was whether the increased rates were published lawfully or unlawfully and, thus, whether LIRR was or was not entitled to its local rates as divisions. Neither the other railroads nor the Commission questioned the lawfulness, reasonableness, or applicability of the cited regulation in the present case, if the increased rates had been published without proper authority. Their sole defense was that the increase in joint rates was lawful because of LIRR's outstanding powers of attorney and similar authorizations granted by LIRR to other carriers and rate bureaus to print and file tariffs on LIRR's behalf, and both the Commission and the District Court ruled against LIRR on this ground.

Upon LIRR's appeal, the Court of Appeals in its opinion of November 7, 1973, stated:

> ". . . the sole issue upon which this appeal rests is whether the Long Island Rail Road successfully

> divorced itself—or flagged out in Interstate Commerce Commission parlance—from the action of the Tariff Executive Association—Eastern Railroads ('TEA-ER') when that body filed a master tariff with the ICC proposing 6% increases in the joint freight rates [footnote omitted] of the Long Island and its other member railroads." (487 F.2d at 180-181)

On the "sole issue" before it, the Court of Appeals ruled in favor of LIRR, correctly holding that a carrier "does not waive its right of independent action under section 5a of the Act by giving a power of attorney," and that the increase in LIRR's joint rates was established without proper authority. (*Id.* at 183)

But then, instead of remanding to the District Court with instructions that LIRR be permitted to make the "retroactive adjustment" in the divisions of the joint rates under the stipulation and agreement by which the *status quo* was maintained *pendente lite* (350 F. Supp. at 116), the Court of Appeals stated that it was not clear "as to the consequences which should follow" upon remand. Despite the clear provisions of the applicable regulation, the Court of Appeals stated that if LIRR were to collect its local rates, it "would receive a windfall without any showing of actual damages" and that LIRR is entitled to recover only such damages as it actually suffered.

However, the Court of Appeals then referred to LIRR's offer to retain as its divisions only so much of the local rates as was necessary to offset its freight deficits during the period the unlawful rates remain in effect[3] and noted this was "one of several possible solutions to the question

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[3] The unlawfully increased joint rates are still in effect. The District Court declined to act on the remand without some clarification but the Court of Appeals by its order of April 19, 1974 denied all petitions for clarification on whether its decision contemplated a roll-back of the rates. ——F.2d——, *infra*, appendix A, page 31.

of the proper remedy." (487 F. 2d at 183) In view of that statement, no petition for a writ of *certiorari* was filed by LIRR at that time.

On remand to the District Court, the parties were unable to agree, and at the suggestion of that Court, a petition and a motion for clarification were filed by LIRR and by the other railroads on March 7, 1974.

In its decision dated March 29, 1974, on the petitions for clarification, 496 F.2d 21, the Court of Appeals ruled:

> "In the absence of some showing to the contrary, it would appear that the Long Island is entitled to any net revenue reduction caused by the increased joint rates to which it objected. In order to recover the Long Island would have to show the reduction in traffic attributable to the new rates and the revenue it would have realized on the lost traffic if the rates had not been increased over its objection. Offset against this amount would be the increased revenue realized by the Long Island as a result of the increased rates and the reduction in expenses occasioned by its handling of a reduced volume of business."

The formula for computing damages was along the lines advocated by the other railroads. LIRR believes it would be impossible for it or any other railroad to compute damages under such a formula. More important, however, the remedy provided by law is for LIRR to collect its local rates as divisions of the unlawful joint rates and not to attempt to prove damages. Again, however, LIRR believed a petition to this Court for a writ of *certiorari* might be considered premature in view of the reference by the Court of Appeals to "the absence of a showing to the contrary," which seemed to be an invitation to make such a showing.

On April 11, 1974, LIRR filed a petition for rehearing which was granted by the Court of Appeals on May 1, 1974,

—— F.2d ——, infra, appendix A, page 33, but by the same order the Court of Appeals decided to adhere to its previous order, without explaining why it thought the Commission regulation was either inapplicable or unlawful.

ARGUMENT

1. Adoption Of "Damages" As A Remedy For Denial Of The Right Of Independent Action Under Section 5a(6) Would Defeat The Statutory Scheme.

If the decision of the Court of Appeals relegating a carrier unlawfully deprived of its right of independent action to an action for damages based upon a formula not susceptible of proof is allowed to stand, then the entire purpose of Congress in enacting Section 5a(6) of the Act will have been frustrated. The right of independent action as guaranteed by Section 5a(6) was in furtherance of a Congressional policy to insure that each railroad would be free to protect its interests and the interests of industries on its line from the rate actions of other carriers or groups of carriers which could have an adverse local effect.

The impracticability of the "damage" formula adopted by the Court of Appeals is highlighted by the adverse local effect suffered by LIRR as a basic but unprovable result of the rate increases unlawfully imposed upon it.

The number of carloads of freight handled by LIRR has declined tremendously since 1968 or 1969. If LIRR were required to try to calculate its "damages" by computing the revenue and costs attributable to each of the many thousands of cars it has lost since 1968 or 1969, by determining what industries would not have moved from and what new industries would have located on Long Island if it had been permitted to maintain the rates existing in 1969, by developing the amount of additional traffic it would have handled and the revenues from and costs of

handling such traffic, etc., it would probably be many years, if ever, before a figure could be arrived at, and then the figure could probably never be supported by probative evidence.

Moreover, even if the approximate amount of damages could in some way eventually be determined, LIRR could not collect from the vast majority of the railroads who took part in the unlawful act. These actions began in the District Court with the filing of (1) a complaint by shippers against LIRR and the railroads with which it has direct connections and (2) a complaint by such railroads against LIRR. LIRR's subsequent third-party-plaintiff complaint, of course, named as defendants only the Commission and the United States (which confessed error on the part of the Commission). Since none of the other railroads in the country sought to intervene following the service of LIRR's third-party complaint, only those railroads originally parties to the action were within the jurisdiction of the Court. Because LIRR by its third-party complaint was seeking *only a review* of the Commission's declaratory orders denying its right provided by Commission regulation to collect its local rates as its divisions of the unlawful joint rates, and was not seeking "damages" under some theory of tort or breach of contract, LIRR did not name as defendants the other involved railroads, which comprise virtually all the railroads of any size in the country. Obviously, they would not be bound by any judgment for damages in favor of LIRR in an action in which they were not named as defendants and did not choose to intervene. See: *Gratiot State Bank* v. *Johnson*, 249 U.S. 246 (1919); *Western Union Tel. Co.* v. *Foster*, 247 U.S. 105, 115 (1918). Before it could award any damages against such railroads, the District Court must have *in personam* jurisdiction over them. See, e.g., *Employees Corp.* v. *Bryant*, 299 U.S. 374 (1934).

If the standard of "damages" outlined by the Court of Appeals were to be adopted as the remedy for denial of the right of independent action guaranteed by Section 5a(6), that statutory right would be almost meaningless. According to the testimony of record by the Chairman of the TEA—ER, the principal rate bureau involved, by denying LIRR its statutory right of independent action, the Eastern railroads were able to get $100 million annually which they would otherwise not get from the 6-percent increase in Ex Parte No. 262, and Penn Central's traffic witness testified that carrier alone would reap $40 million annually. With the three subsequent unlawful increases[4] totaling another 22 to 24 percent, the unlawfully obtained and ill-gotten gains of the Eastern railroads would approximate $500 million annually. While LIRR has always doubted the accuracy of such figures, they appear in the verified statements referred to. It will obviously take severe penalties to discourage the other railroads from repeating or force them to discontinue unlawful conduct which they believe to be so profitable. The retention by LIRR of its local rates as its divisions of the unlawful joint rates, as provided by law, is not an inappropriate or disproportionate penalty for the violating railroads to pay and, indeed, may not be sufficient to act as a deterrent. To require them to pay only such damages as can be proven by LIRR under an impossible formula can only act as an invitation to future violations of the right of independent action guaranteed each railroad under Section 5a(6), since all penalties are vitiated and the profits are so great.

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[4] In addition to the unlawful increase in Ex Parte No. 262, three additional unlawful increases were made effective in Ex Parte Nos. 265 and 267, *Increased Freight Rates, 1970 and 1971*, 339 I.C.C. 125 and Ex Parte No. 281, *Increased Freight Rates and Charges 1972*, 341 I.C.C. 288, before the Commission and the railroads finally decided to recognize LIRR's statutory right of independent action.

2. This Case Involves Solely A Violation Of The Interstate Commerce Act And The Remedy Provided For Such Violation.

The case before the Court of Appeals involved an appeal by LIRR from the decision of the United States District Court for the Eastern District of New York in *Ajayem Lumber Corp.* v. *Penn Central Transp. Co.*, 350 F.Supp. 111, which generally adopted the rulings of the Commission in *Declaratory Order—Rule 52 of Tariff Cir. No. 20*, 337 I.C.C. 247, 337 I.C.C. 274, involving Sections 5a, 6, and 15 of the Interstate Commerce Act (49 U.S.C. §§ 5b, 6 and 15) and, more specifically, one of the regulations prescribed by the Commission pursuant to its powers under Section 6.

Where joint rates for the transportation of freight over the lines of two or more railroads have been established, either by voluntary agreement of *all* participating carriers or by prescriptive action of the Commission, after full hearing, under the provisions of Section 15(1) (or Section 15(3) with regard to initial joint rates), the divisions of such joint rates are either negotiated and voluntarily agreed to by all of the participating carriers or prescribed by the Commission under Section 15(6).

As the Court of Appeals pointed out in its November 7, 1973, decision (487 F.2d at 181), once joint rates are established they cannot lawfully be changed except by agreement of all participating railroads or by the Commission, after full hearing, under Section 15(1). In the instant case, the Commission has never prescribed the general level of joint rates to or from points on LIRR, and LIRR has not agreed to an increase in the general level of its joint rates above that prevailing on November 17, 1969.[5]

So far as lawful joint rates in which LIRR has concurred are concerned, prior to November 18, 1969, the divisions of

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[5] Except for certain surcharges not relevant herein.

such joint rates were on an agreed basis. In August of 1969, LIRR filed a complaint seeking Commission prescription of new divisions with respect to most, although not all, of the joint rates on traffic moving to or from points on LIRR. In Docket No. 35153, *The Long Island Rail Road Company* v. *The Ahnapee and Western Railway Company, et al.* (not printed), the Commission prescribed somewhat higher divisions for LIRR, such order having become effective on October 4, 1973. When lawful joint rates are reinstituted to or from points on LIRR, or new joint rates are prescribed by the Commission after full hearing under Section 15(1), the divisions of such lawful joint rates will be in accordance with the Commission order in Docket No. 35153. The Commission order prescribing divisions of lawful joint rates in Docket No. 35153, however, is not involved in this case and has no bearing on it.

This case involves the question of the divisions of unlawfully established joint rates. As the Court of Appeals correctly found, LIRR's joint rates were unlawfully increased on November 18, 1969, because such increases were without LIRR's concurrence and over LIRR's objections, thus denying LIRR its statutory right of independent action guaranteed by Section 5a(6).

While the joint rates to or from points on LIRR, as increased on November 18, 1969, and on three subsequent occasions since then, were the "legal" rates which shippers must pay, they were unlawful, so far as traffic to or from points on LIRR was concerned, because they were published without proper authority. Pursuant to the provisions of Section 6, the Commission had adopted a rule to cover just such a situation, the last sentence of which provides:

> "The carrier over whose line shipments are sent under a joint tariff is bound by the terms of that tariff if it has lawfully concurred therein, and, if it has not lawfully concurred therein, may not accept earnings in

> accordance therewith, but *must demand* for the service performed its lawful earnings according to its lawful tariffs." (Emphasis added) (49 C.F.R. § 1300.52(b))

Rule 52(b) is in accord with the Commission's decision in *St. Louis & O'Fallon Ry. Co.* v. *E. St. L. & S. Ry. Co.*, 81 I.C.C. 538 (1923), in which the Commission held:

> "The defendants are bound to protect the rate published and held out by them to the public. Complainant, not being a party to the rate published, *must now collect* its local rate and the defendants *must pay* to it this rate until the tariff is corrected in accord with the statute." (Emphasis added) (*Id.* at 541)

In its first report and declaratory order in Ex Parte No. 262 (Sub-No. 1), *Declaratory Order—Rule 52 of Tariff Cir. No. 20*, 337 I.C.C. 247, the Commission held:

> "Under Rules 26(g) and 52 the Long Island would be entitled to its local rates if joint rates were published for its account without the authority of effective powers of attorney or concurrences on file with the Commission. But the insurmountable difficulty with the Long Island's position is that it is a party to the increased joint rates in question and that its participation therein is authorized by outstanding powers of attorney and concurrences which are on file with the Commission." (*Id.* at 252-253)

The Court of Appeals correctly found that the outstanding power of attorney did not constitute proper authority for the action taken and that LIRR's joint rates had been increased without proper authority. Pursuant to the provisions of the stipulation entered into before the District Court as well as under Rule 52(b), LIRR is clearly entitled to collect its local rates as its divisions retroactively to the time of the violation. No one has challenged the lawfulness or applicability of the tariff rule and the Com-

mission has taken no steps to revoke it. It was not until oral argument before the Court of Appeals that counsel for the other railroads suggested that LIRR should not be allowed to collect its local rates because it had not shown it has been damaged to that extent.

Clearly, LIRR is entitled to the statutory remedy and it should not be relegated to a remedy based upon a common law concept of damages under a formula which would make determination of such damages impossible.

3. Rule 52(b) Has The Force Of Law And Provides For The Exclusive Remedy In This Case.

Section 5a(6) of the Act guarantees each carrier the right of independent action, and Section 6(4) (49 U.S.C. § 6(4)) requires the concurrence of all participating carriers in joint tariffs. Pursuant to the provisions of Sections 5, 6 and 12 (49 U.S.C. §§ 5, 6, 12), the Commission has issued tariff rules and regulations (49 C.F.R. § 1300.0, *et seq.*) and Rule 52(b) thereof provides that where a carrier has not lawfully concurred in published joint rates, such carrier "must demand for the service performed its lawful earnings according to its lawful tariffs," which in this case means LIRR's local rates.

It has long been established that such regulations have the force of law. *See, e.g., California Comm'n* v. *United States,* 355 U.S. 534, 542-543 (1958); *Columbia System* v. *United States,* 316 U.S. 407, 418-419 (1942); *Ford* v. *United States,* 371 U.S. 245, 255 (1963); *Abbot Laboratories* v. *Gardner,* 387 U.S. 136, 151-152 (1967); *Davis, Administrative Law,* § 503, p. 126.

It is even more firmly established that such a remedy is exclusive. As early as *Pollard* v. *Bailey,* 87 U.S. 520 (1874), this Court stated:

> "The liability and the remedy were created by the same statute. This being so, the remedy provided is

> exclusive of all others. A general liability created by statute without a remedy may be enforced by an appropriate common-law action. But where the provision for the liability is coupled with a provision for a special remedy, that remedy, and that alone, must be employed." (*Id.* at 527)

The *Pollard* decision is still the law today. *See*, e.g., *United States* v. *Madison County Bd. of Education*, 326 F.2d 237, 242 (5th Cir., 1964).

Thus, in this case, Rule 52(b) provides the exclusive remedy, and resort to a theory of "damages" by the Court of Appeals was both unnecessary and improper.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the Court should issue a Writ of Certiorari to review the judgments, orders and opinions of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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July, 1974

APPENDIX A

487 F2d 179

Opinion, United States Court of Appeals for the Second Circuit.

Nos. 843, 848—September Term 1972

(Argued June 4, 1973 Decided November 7, 1973)

Docket Nos. 72-2123, 72-2189

AJAYEM LUMBER CORP.,

Plaintiff-Appellee,

v.

PENN CENTRAL TRANSPORTATION CO., ERIE LACKAWANNA RAILWAY CO., LEHIGH VALLEY RAILROAD CO., JOHN E. FARRELL, as Trustee of the CENTRAL RAILROAD CO. OF NEW JERSEY, BALTIMORE & OHIO RAILROAD CO.,

Defendants-Appellees,

THE LONG ISLAND RAIL ROAD COMPANY,

Defendant-Appellant.

THE LONG ISLAND RAIL ROAD COMPANY,

Third-Party Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Third-Party Defendant-Appellant,

and

INTERSTATE COMMERCE COMMISSION,

Third-Party Defendant-Appellee.

Appendix A.

PENN CENTRAL TRANSPORTATION CO., ERIE LACKAWANNA RAILWAY CO., LEHIGH VALLEY RAILROAD CO., JOHN E. FARRELL, as Trustee of the CENTRAL RAILROAD CO. OF NEW JERSEY, BALTIMORE & OHIO RAILROAD CO.,

Plaintiffs-Appellees,

v.

THE LONG ISLAND RAIL ROAD COMPANY,

Defendant-Appellant.

Before: HAYS, MANSFIELD and MULLIGAN, Circuit Judges.

Appeal from a decision and order of the United States District Court for the Eastern District of New York, John R. Bartels, *Judge*, holding that the appellant railroad did not take the proper steps to divorce itself from the action taken by the railroad association of which it was a member and that it was therefore bound by joint rates agreed upon by the association, and enjoining the appellant railroad from refusing to accept freight cars tendered to it upon the existing agreed basis of divisions of joint rates until the Interstate Commerce Commission made a final determination with respect to the divisions.

Reversed and remanded.

Walter J. Myskowski, Washington, D.C. (George M. Onken, Robert R. Prince, Richard H. Stokes, New York, New York, on the brief), for *Appellant Long Island Rail Road Company,*

John B. Wyss (Carl D. Lawson, Thomas E. Kauper, Assistant Attorney General, Department of Justice, Washington, D.C., on the brief), *for Appellant United States of America,*

Appendix A.

Raymond M. Zimmet (Fritz R. Kahn, General Counsel, Interstate Commerce Commission, Washington, D.C., on the brief), *for Appellee Interstate Commerce Commission,*

Edward A. Kaier, Philadelphia, Pennsylvania (Jerome H. Shapiro, New York, New York, Richard J. Murphy, Philadelphia, Pennsylvania, Richard B. Wachenfeld, Newark, New Jersey, Frederick G. Hoffman, New York, New York, Andrew C. Armstrong, Baltimore, Maryland, on the brief), *for Appellee Railroads.*

HAYS, Circuit Judge:

This is an appeal from a decision and order of the United States District Court for the Eastern District of New York in a case which has had a four year history of litigation and adjudication in the Interstate Commerce Commission and the courts. Although there are innumerable complexities involved in the issue of rate-making for railroad carriers of freight, the sole issue upon which this appeal rests is whether the Long Island Rail Road successfully divorced itself—or "flagged out" in Interstate Commerce Commission parlance—from the action of the Tariff Executive Association—Eastern Railroads ("TEA—ER") when that body filed a master tariff with the ICC proposing 6% increases in the joint freight rates[1] of the Long Island and its other member railroads. The district court, in upholding the position of the appellee railroads and the ICC, determined that the Long Island had been unsuccessful in its attempt to "flag out" of the proposed rate increase when notified of it by the TEA—ER and thus it enjoined the LIRR from refusing to accept freight cars tendered to

it and from refusing to apply the newly established formula for division of joint rate revenues—a "self-help" action taken by the LIRR in response to the refusal on the part of the TEA—ER and the ICC to recognize its flag out.

I. Factual Background

The Tariff Executive Association—Eastern Railroads is an association of railroads authorized by section 5a of the Interstate Commerce Act, 49 U.S.C. § 5b, and approved by the Commission. The Long Island and the appellee railroads are members of the TEA-ER and have an agreement authorizing joint actions by the Association. The TEA-ER provides a focal point for joint consideration of rate changes and it acts as a tariff bureau which files and publishes the necessary documents to make a rate change effective. To this end, the Association, as do other similar bodies throughout the nation, holds power of attorney from its members which enables it to make publications and filings on behalf of its members. Because such concerted action in the area of rate-making clearly falls within the proscriptions of the federal anti-trust laws, Congress in authorizing such associations exempted them from the anti-trust laws, but in so doing it provided that any agreement establishing the procedure for the determination of joint rates must afford "each party the free and unrestrained right to take independent action either before or after any determination arrived at through such procedure." 49 U.S.C. § 5b(6).

The "flagging out" procedure which is at the center of the controversy at bar is one method by which member railroads can exercise their right of independent action under section 5a of the Act. It enables a member of a rate-making association to divorce itself from a "joint" decision made by such an association (if that decision has

the effect of changing established rates) by giving due notice to all concerned parties. After that notice is given, the association, acting as agent for the railroads, notes when it publishes the new tariff schedule, that the new rate will not be applicable to the railroad which has "flagged out."

The Interstate Commerce Act provides for two methods for changing existing joint rates. Rates may be changed by a single carrier, by several carriers acting independently of their association, or by all carriers through the action of their association after the consent of all of the affected carriers is received. The *new* rates are then subject to review by the ICC under 49 U.S.C. § 15(7) where a determination of the reasonableness of the new rates is made. The second method of changing existing joint rates is through the action of the Commission—either at the request of other carriers or on its own motion—under section 15(1) after a full hearing is accorded where the views of an objecting carrier may be presented. When the membership of a rate-making association decides to propose changes in existing rates, a dissenting member by giving due notice, i.e. "flagging out," may continue to charge the previouly existing rates. Since proposed rates constitute changes in existing rate schedules, the proposal is subject to ICC examination and possible suspension under section 15(7). Thus in the present case where the Long Island wanted to maintain the status quo its request was not subject to any procedure other than one for "flagging out" or, eventually, if requested by the ICC or a carrier, a section 15(1) full hearing to determine whether the existing rates which it wished to maintain were correct, just and reasonable.

To expedite a rate change, the ICC may give railroads special permission to dispense with some of the publication requirements and proceed in what is known as the short-form method. This procedure was followed in the

case at bar. The sequence of events surrounding the challenged action is set forth in detail in the district court's opinion, 350 F. Supp. 111, 114-117 (E.D.N.Y. 1972), and will not be repeated here.

II. The District Court Decision

The district court concluded that the Long Island was not entitled to claim its local rates because it was bound by the action of its agent, the TEA-ER, in publishing the new rates in its behalf. The court held that the railroad's actions in notifying the Association of its desire not to be included in the new rate schedule were not sufficient to enable the Long Island to maintain its existing rates. The court ruled that a member railroad could opt out of an association decision on rate-making only by revoking the power of attorney that the railroad had given the association. It further decided that such a revocation could only occur in strict accordance with the rules as laid down by the Commission, which would include filing a formal statement of its own proposed revised tariffs for submission to the ICC for approval under 49 U.S.C. § 15(7).

The district court rejected the argument of the Long Island, also made by the United States which had confessed error, that the actions of the TEA-ER and the other carriers in forcing the higher joint rates upon the Long Island violated the right of independent action guaranteed to members of associations such as the TEA-ER by section 5a of the Act. The court found that section 5a, the Reed-Bulwinkle Act, did not call for any change in the consequences of the powers of attorney which were in effect at the time of the adoption of section 5a, and that the Long Island could have exercised its right of independent action by revoking the power of attorney it had filed with the Association.

We reverse. The Interstate Commerce Commission erred in finding that the Long Island Railroad failed to take the proper steps to opt out of the increased rates submitted to the Commission by the tariff-publishing agent of the eastern railroads. It is clear that the Long Island took every step possible to "flag out" of the proposed increased rates submitted to the ICC by the Tariff Executive Association. The railroad appellees and the ICC agree that but for their interpretation of the power of attorney issued by the LIRR to the TEA-ER the Long Island could not be held to have acquiesced in the new rate schedule. We think it patent, however, that the powers of attorney between the railroad members of associations such as the TEA-ER and their agent only give the latter the authority to *file* proposed rate changes and not to set them without consultation or concurrence of the member railroads. Indeed, by letter of October 1969, the chairman of the TEA-ER wrote to the Long Island and stated that the proposed rate schedule was about to be submitted for approval and that he assumed that the Long Island would "join with the other railroads." But, he continued, if "this should be contrary to your desires you may direct me to eliminate the name of your company and the petition will be amended accordingly." Such procedure as the Long Island followed in this case have been considered adequate in the past to enabe a member railroad to disassociate itself from association actions.

The ICC persists in arguing that member railroads of the TEA-ER can revoke their powers of attorney only on giving 60 days notice of intention to file a formal withdrawal. Not only does it appear that the *60* day notice provision is applicable only when a principal is revoking the total power of attorney held by its agent preparatory to its retaining another agent, but more importantly, as we have said, the power of attorney did not authorize the TEA-ER to propose or consent to new tariffs or rates;

it merely permitted the filing of tariffs consented to by member railroads. A carrier does not waive its right of independent action under section 5a of the Act by giving a power of attorney. The suggestion of the ICC, that the Long Island's remedy was to file a suit in equity to compel the agent to file the flag out can hardly be called the kind of independent action which the Reed-Bulwinkle Act was designed to protect.

The ICC also contends that the Long Island's effort to flag out of the new rates was defective because it was not made as a formal motion or similar procedure, the exact nature of which the counsel for the ICC never made clear. The statute does not require any specific form for the "flag out" notice to the Commission and the Long Island's efforts to notify all concerned about its intentions were clearly adequate, especially in view of ICC's lack of precision in what it would require for a "formal" flag notice.

If the Long Island's right of independent action was to be given any meaning at all, it was entitled to a hearing *before* the new joint rates went into effect. Until such a hearing was held and a determination made of the lawfulness of the rates as proposed, the Long Island had a right to insist on the maintenance of its existing joint rates. See *ICC* v. *Columbus & Greenville Ry.*, 319 U.S. 551, 555 (1943).

Although we are persuaded that the position taken by the Long Island must prevail we are not so clear as to the consequences which should follow upon our reversal of the district court's decision. The Long Island is entitled to recover from the railroad defendants only such damages as it actually suffered by reason of the defendant's institution of the new higher rates before the hearing and determination of lawfulness to which the Long Island was entitled. If we were to order that the Long Island should collect as damages the difference between

what it had to charge as divisions of the joint rate and what its local rates were when the changes were made, the Long Island would receive a windfall without any showing of actual damages. Moreover, the ICC has reached the merits of the reasonableness of the increases involved in this dispute and has found that the increases were lawful in that they did not exceed reasonable maximum levels. 337 ICC 274, 286 (1970). Finally, since there have been several subsequent increases further ICC rate proceedings in this action would appear to be unjustified.

The Long Island, in asking this court to reverse the decision of the district court contends that the effect of the higher rates has been to lower the volume of traffic on its road, causing it loss of revenue. It suggests that it be permitted to negotiate new divisions of the joint rates sufficient for it to retain as damages no more than an amount necessary to cover the full costs of performing the freight service with no return on investment or profit above such full costs. While expressing no views as to the merits of this proposal, we note that it is one of several possible solutions to the question of the proper remedy.

A remand is necessary so that the district court may determine the amount of damages, if any, which the Long Island is entitled to receive as a result of our decision determining that the Long Island should have been allowed to flag out of the new joint rates submitted by the TEA-ER and authorized by the ICC.

Reversed and remanded.

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[1] Joint rates are employed when shipments are transported over the tracks of more than one railroad. The rate paid is divided between the railroads over whose tracks the shipments pass according to a schedule established by agreement of the affected railroads. The share of each railroad in the joint rates is usually lower than the charge for a comparable local shipment, i.e., the charge for shipments which travel over the tracks of only one railroad.

Appendix A.

Order of Reversal.

UNITED STATE COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of November one thousand nine hundred and seventy-three.

Present: HON. PAUL R. HAYS
HON. WILLIAM R. MANSFIELD
HON. WILLIAM H. MULLIGAN
Circuit Judges

72-2123
72-2189

Ajaymen Lumber Corp.,

Plaintiff-Appellee,

v.

Penn Central Transportation Co., Erie Lackawanna Railroad Co., Lehigh Valley Railway Co., John E. Farrell, as Trustee of the Central Railroad Co. of New Jersey, Baltimore & Ohio Railroad, and The Long Island Railroad Company,

Defendants,

The Long Island Railroad Company,

Third-Party Plaintiff-Appellant,

Appendix A.

United States of America and Interstate Commerce Commission,

Third-Party Defendants,

United States of America,

Third-Party Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and that the action be and it hereby is remanded to said District Court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellees.

A. Daniel Fusaro
Clerk

By: Vincent A. Carlin
Chief Deputy Clerk

Appendix A.

Opinion on Clarification, —— F2d ——.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 843, 848—September Term 1972.

(Argued June 4, 1973 Decided March 29, 1974.)

Docket Nos. 72-2123, 72-2189

AJAYEM LUMBER CORP.,
Plaintiff-Appellee,

v.

PENN CENTRAL TRANSPORTATION CO., ERIE LACKAWANNA RAILWAY CO., LEHIGH VALLEY RAILROAD CO., JOHN E. FARRELL, as Trustee of the Central Railroad Co. of New Jersey, Baltimore & Ohio Railroad Co.,
Defendants-Appellees,

THE LONG ISLAND RAIL ROAD COMPANY,
Defendant-Appellant.

THE LONG ISLAND RAIL ROAD COMPANY,
Third-Party Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Third-Party Plaintiff-Appellant,
and
INTERSTATE COMMERCE COMMISSION,
Third-Party Plaintiff-Appellee.

Appendix A.

PENN CENTRAL TRANSPORTATION CO., ERIE LACKAWANNA RAILWAY CO., LEHIGH VALLEY RAILROAD CO., JOHN E. FARRELL, as Trustee of the Central Railroad Co., of New Jersey, Baltimore & Ohio Railroad Co.,

Plaintiffs-Appellees,

v.

THE LONG ISLAND RAIL ROAD COMPANY,

Defendant-Appellant.

BEFORE:

HAYS, MANSFIELD and MULLIGAN,

Circuit Judges.

Petition for clarification of a decision of this Court rendered on November 7, 1973, reversing an order of the United States District Court for the Eastern District of New York, John R. Bartels, *Judge*, and remanding the case for a determination of the damages to which the Long Island Rail Road Company is entitled.

WALTER J. MYSKOWSKI, Washington, D.C. (George M. Onken, Robert R. Prince, Richard H. Stokes, New York, New York, on the brief), *for Appellant Long Island Rail Road Company,*

JOHN B. WYSS (Carl D. Lawson, Thomas E. Kauper, Assistant Attorney General, Department of Justice, Washington, D.C., on the brief), *for Appellant United States of America,*

Appendix A.

RAYMOND M. ZIMMET (Fritz R. Kahn, General Counsel, Interstate Commerce Commission, Washington, D.C., on the brief), *for Appellee Interstate Commerce Commission,*

EDWARD A. KAIER, Philadelphia, Pennsylvania (Jerome H. Shapiro, New York, New York, Richard J. Murphy, Philadelphia, Pennsylvania, Richard B. Wachenfeld, Newark, New Jersey, Frederick G. Hoffman, New York, New York, Andrew C. Armstrong, Baltimore, Maryland, on the brief), *for Appellee Railroads.*

PER CURIAM:

Appellant Long Island Rail Road Company petitions for clarification of our order of November 7, 1973, with respect to the measure of damages which the Long Island is entitled to recover.

In the absence of some showing to the contrary, it would appear that the Long Island is entitled to any net revenue reduction caused by the increased joint rates to which it objected. In order to recover the Long Island would have to show the reduction in traffic attributable to the new rates and the revenue it would have realized on the lost traffic if the rates had not been increased over its objection. Offset against this amount would be the increased revenue realized by the Long Island as a result of the increased rates and the reduction in expenses occasioned by its handling of a reduced volume of business.

Appendix A.

Order Denying Petition for Clarification,
—— F2d ——

72-2123
B 12

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 19th day of April, one thousand nine hundred and seventy-four.

Ajayem Lumber Corp.,

Plaintiff-Appellee,

v.

Penn Central Transportation Co., Erie Lackawanna Railroad Co., Lehigh Valley Railway Co., John E. Farrell, as Trustee of the Central Railroad Co., of New Jersey, Baltimore & Ohio Railroad, and the Long Island Railroad Company,

Defendants,

The Long Island Railroad Company,

Third Party Plaintiff-Appellant.

United States of America and Interstate Commerce Commission,

Third Party-Defendants,

Appendix A.

United States of America,

Third Party Defendant-Appellant.

It is hereby ordered that the motion made herein by counsel for the appellee Interstate Commerce Commission filed April 5, 1974 for clarification of a decision of this court filed November 7, 1973 be and it hereby is denied.

PAUL R. HAYS

WALTER R. MANSFIELD

WILLIAM H. MULLIGAN

Circuit Judges

Received

Order Granting Petition for a Rehearing.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket No. 72-2123

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the First day of May, one thousand nine hundred and Seventy-Four.

Present:

HON. PAUL R. HAYS
HON. WALTER R. MANSFIELD
HON. WILLIAM H. MULLIGAN
Circuit Judges.

Appendix A.

AJAYEM LUMBER CORP.,

Plaintiff-Appellee,

—against—

PENN CENTRAL TRANSPORTATION CO., ERIE LACKAWANNA RAILROAD CO., LEHIGH VALLEY RAILWAY CO., JOHN E. FARREL, as Trustee of the CENTRAL RAILROAD COMPANY of NEW JERSEY, BALTIMORE & OHIO RAILROAD, and THE LONG ISLAND RAILROAD COMPANY,

Defendants,

THE LONG ISLAND RAILROAD COMPANY,

Third-Party Plaintiff-Appellant,

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Third-Party Defendants,

UNITED STATES OF AMERICA,

Third-Party Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is GRANTED.

s/A. DANIEL FUSARO
Clerk

Appendix A.

Opinion on Petition for Rehearing.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 843, 848—September Term, 1972.

(Argued June 4, 1973 Decided May 1, 1974.)

Docket Nos. 72-2123
72-2189

AJAYEM LUMBER CORP.,
Plaintiff-Appellee,

—v—

PENN CENTRAL TRANSPORATION CO., ERIE LACKAWANNA RAILWAY CO., LEHIGH VALLEY RAILROAD CO., JOHN E. FARRELL, as Trustee of the Central Railroad Co. of New Jersey, Baltimore & Ohio Railroad Co.,
Defendants-Appellees,

THE LONG ISLAND RAIL ROAD COMPANY,
Defendant-Appellant.

THE LONG ISLAND RAIL ROAD COMPANY,
Third-Party Plaintiff-Appellant,

—v—

UNITED STATES OF AMERICA,
Third-Party Defendant-Appellant,

and

INTERSTATE COMMERCE COMMISSION,
Third-Party Defendant-Appellee.

Appendix A.

PENN CENTRAL TRANSPORTATION CO., ERIE LACKAWANNA RAILWAY CO., LEHIGH VALLEY RAILROAD CO., JOHN E. FARRELL, as Trustee of the Central Railroad Co. of New Jersey, Baltimore & Ohio Railroad Co.,

Plaintiffs-Appellees,

—v—

THE LONG ISLAND RAIL ROAD COMPANY,

Defendant-Appellant.

Before:

HAYS, MANSFIELD and MULLIGAN,

Circuit Judges.

Petition for rehearing on a decision of this Court rendered on March 29, 1974, clarifying as to the measure of damages a decision of this Court rendered on November 7, 1973, reversing an order of the United States District Court for the Eastern District of New York, John R. Bartels, *Judge,* and remanding the case for a determination of the damages to which the Long Island Rail Road Company is entitled.

Petition granted and decision affirmed.

WALTER J. MYSKOWSKI, Washington, D.C. (George M. Onken, Robert R. Prince, Richard H. Stokes, New York, New York, on the brief), *for Appellant Long Island Rail Road Company,*

JOHN B. WYSS (Carl D. Lawson, Thomas E. Kauper, Assistant Attorney General, De-

partment of Justice, Washington, D.C., on the brief), *for Appellant United States of America,*

RAYMOND M. ZIMMET (Fritz R. Kahn, General Counsel, Interstate Commerce Commission, Washington, D.C., on the brief), *for Appellee Interstate Commerce Commission,*

EDWARD A. KAIER, Philadelphia, Pennsylvania (Jerome H. Shapiro, New York, New York, Richard J. Murphy, Philadelphia, Pennsylvania, Richard B. Wachenfeld, Newark, New Jersey, Frederick G. Hoffman, New York, New York, Andrew C. Armstrong, Baltimore, Maryland, on the brief), *for Appellee Railroads.*

PER CURIAM:

By an opinion dated November 7, 1973, this court reversed a judgment entered in the United States District Court for the Eastern District of New York and remanded the cause for determination of damages. On a petition for clarification we entered an order dated March 29, 1974, clarifying as to the measure of damages our opinion of November 7, 1973. The Long Island Rail Road Company has now petitioned for a rehearing on our order of March 29, 1974.

We grant the motion for rehearing and on consideration thereof we decide to adhere to our order of March 29, 1974.

APPENDIX B

Section 5a(6) Interstate Commerce Act (49 U.S.C. § 5b(6))

"Agreements for determining matters through joint consideration.

(6) The Commission shall not approve under this section any agreement which establishes a procedure for the determination of any matter through joint consideration unless it finds that under the agreement there is accorded to each party the free and unrestrained right to take independent action either before or after any determination arrived at through such procedure."

Section 5a(9) Interstate Commerce Act (49 U.S.C. § 5b(9))

"Relief from operation of antitrust laws.

(9) Parties to any agreement approved by the Commission under this section and other persons are, if the approval of such agreement is not prohibited by paragraph (4), (5), or (6) of this section, relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission."

Section 6(3) Interstate Commerce Act (49 U.S.C. § 6(3))

"Change in rates, fares, etc.; notice required; simplification of schedules.

(3) No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and

to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided,* That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions: *Provided further,* that the Commission is authorized to make suitable rules and regulations for the simplification of schedules of rates, fares, charges, and classifications and to permit in such rules and regulations the filing of an amendment of or change in any rate, fare, charge, or classification without filing complete schedules covering rates, fares, charges or classifications not changed if, in its judgment, not inconsistent with the public interest."

Section 6(4) Interstate Commerce Act (49 U.S.C. § 6(4))

"Joint Tariffs.

(4) The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties."

Appendix B.

Section 6(7) Interstate Commerce Act (49 U.S.C. § 6(7))

"Transportation without filing and publishing rates forbidden; rebates; privileges.

(7) No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

Section 15(1) Interstate Commerce Act (49 U.S.C. §15(1))

"Commission empowered to determine and prescribe rates, classifications, etc.

(1) Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by

any common carrier or carriers subject to this chapter for the transportation of persons or property as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation of practice so prescribed."

Section 15(3) Interstate Commerce Act (49 U.S.C. § 15(3))

"Establishment of through routes, joint classifications, joint rates, fares, etc.

(3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon

its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this chapter, or by carriers by railroad subject to this chapter and common carriers by water subject to chapter 12 of this title, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancellation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section."

Section 15(6) Interstate Commerce Act (49 U.S.C. § 15(6))

"Commission to establish just divisions of joint rates, fares, or charges; adjustments.

(6) Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or prop-

erty, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares, and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge."

Section 15(7) Interstate Commerce Act (49 U.S.C. § 15(7))

"Commission to determine lawfulness of new rates; suspension; refunds.

(7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts

received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

Rule 52(b) Interstate Commerce Commission Tariff Circular No. 20 (49 C.F.R. § 1300.52(b))

"Tariff unlawful as to carriers named without authority. (b) If one or more carriers are, without proper authority, so shown as participating in any tariff and other carriers are lawfully shown as parties thereto, the use of the publication is unlawful as to the carriers that are named as parties thereto without proper authority and lawful as to those that are parties to it under proper authority. The carrier over whose line shipments are sent under a joint tariff is bound by the terms of that tariff if it has lawfully concurred therein, and, if it has not lawfully concurred therein, may not accept earnings in accordance therewith, but must demand for the service performed its lawful earnings according to its lawful tariffs."

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1974.

No. 74-27.

THE LONG ISLAND RAIL ROAD COMPANY,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION, et al.,
Respondents.

BRIEF IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-27

THE LONG ISLAND RAIL ROAD COMPANY,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

I. STATEMENT.

The District Court dismissed the case below. The Long Island Rail Road, Petitioner, appealed from that order on the ground that the District Court erroneously held (1) that the Long Island had failed to take proper steps to opt out of a tariff of proposed increased rates and (2) that Long Island had not been denied the right to make an independent determination of its rates, which is required by Section 5a of the Interstate Commerce Act, 49 U.S.C. § 5a. The United States, a party to the case, supported the Long Island in that appeal.

The Court of Appeals decided the tariff and Section 5a questions in favor of Long Island. Nothing remains of those issues. As to damages, the Court of Appeals has three times reviewed that matter and each time has concluded that the damages to which Long Island is entitled is not the windfall it seeks but rather is "any net revenue reduction caused by the increased joint rates to which it objected" (30a).

There is no public interest or important question in this narrow measure of damages issue and no conflict with other decisions. There is nothing in this case which indicates the presence of a substantial question requiring the attention of this Court.

The controversy arises from the fact that the Long Island has been dissatisfied with the basis of divisions to which it agreed and which has been applied in allocating revenues among the railroads which are parties to the joint through rates applicable between Long Island Rail Road points and other points throughout the United States, Canada, and Mexico. In discussing the Long Island's stated reason for not concurring in the rate increase in controversy, the Interstate Commerce Commission found that it could not accept as valid the "transparent postulation" of Long Island Rail Road that the rate increases would be self-defeating. Its motivation, in not concurring in the increase, the Commission found, was clearly to put pressure on the connecting carriers to renegotiate their divisions agreement. (Petitions for Declaratory Order—Rule 52 of Tariff Circular No. 20, 337 I.C.C., 274, 286).

The tariff publishing agent testified that he had conflicting instructions in this matter, an instruction from the Long Island not to increase the joint rates between Long Island points and points on other railroads and an instruction from all the other railroads of the country to increase those rates in common with all other rates between all

points. He testified further that in view of the conflict he followed the instructions of the majority (429a-430a).* The tariff which he filed and written statements by the Long Island and by the other lines were received by the Commission before the tariff became effective and thereafter and the increased rates were examined by the Commission at length and under all provisions of the Interstate Commerce Act and were found by the Commission not to be unreasonable.

The Long Island argues that, under a provision of the Commission's tariff publishing rules it is entitled to receive, as its share of the joint rates, its local rates between interchange points with respondents and origins and destinations of the traffic on the Long Island because the increases in rates to and from all Long Island points were made without proper authority from that railroad. The Court of Appeals sustained the Long Island's contention that the increase in joint rates was made without proper authority from the Long Island and that, in the circumstances, it was deprived of its right of independent action. That Court denied the Long Island the windfall which it would reap if that position with respect to damages should be upheld, and it spelled out the proper measure of damages. Had the Long Island's position been upheld, the result would have been that its divisions would have been trebled and its connecting carriers (most of which are in bankruptcy) would have been required to haul the traffic, or much of it, without receiving anything for the transportation performed by them (439a).*

Long Island argues, however, that the aforesaid tariff rule of the Commission requires that it take its local rate as its divisional share of the joint rates. That no such arbitrary result is required is shown by the fact that Long

* The above references and that on page 4 are to the record in the Court of Appeals.

Island concurrently urges the contrary position, i.e., that the taking of its local rates as divisions is required or permitted by the tariff-circular rule upon which it relies (92a).

Moreover, the Long Island has been free at any time to restrict the concurrences which it has on file with the Interstate Commerce Commission, thus mitigating its damages. But it never sought to mitigate.

CONCLUSION.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM 1974

No. 74-27

THE LONG ISLAND RAIL ROAD COMPANY, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, ET AL.,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION

QUESTION PRESENTED

In our view, the question presented is whether the Court of Appeals properly found that petitioner was entitled only to its actual damages pursuant to a stated formula as compensation for its unlawful inclusion in a general rate increase, and was not entitled to the "windfall" of its local rates for the period of unlawfulness.

STATEMENT

This case arose when the Tariff Executive Association—Eastern Railroads ("TEA-ER"), a rate bureau

formed pursuant to Section 5a of the Interstate Commerce Act (49 U.S.C. § 5b), adopted increased rail rates and charges pursuant to the 6% general increase authorized by the Interstate Commerce Commission in Ex Parte No. 262, *Increased Freight Rates, 1969,* effective in November 1969. Petitioner ("LIRR") claimed that the increase, which included rates on joint-line traffic to and from points on LIRR's lines, was adopted without LIRR's consent and over its objections. After disruption of rail service was threatened because of the dispute between LIRR and its connecting railroads, a shipper on LIRR's lines sought an injunction from the United States District Court for the Eastern District of New York to prevent such an occurrence. The connecting railroads cross-claimed against LIRR. The problem was initially resolved in the district court by adoption of a stipulation among the railroads to maintain service, pending referral of certain questions to the Commission to ascertain the rights and responsibilities of the various parties.

The Commission concluded, in two separate reports, that the inclusion of LIRR's joint rates in the Ex Parte No. 262 increase was proper. Ex Parte No. 262 (Sub-No. 1), *Petition for Declaratory Order—Rule 52 of Tariff Circular No. 20,* 337 I.C.C. 247; 337 I.C.C. 274.

LIRR then brought a third-party complaint in the district court action to review the Commission's orders, naming the United States and the Commission as third-party defendants.[1] The district court sus-

[1] The United States filed an answer confessing error, but the Commission defended the validity of its orders.

tained the Commission (350 F. Supp. 111), but on appeal the court of appeals reversed (Pet. App. A, 487 F. 2d 179), holding that the Commission had erred in finding that LIRR had "failed to take the proper steps to opt out of" the Ex Parte No. 262 increase; that LIRR "was entitled to a hearing before the new joint rates went into effect"; and that until such a hearing might be held, LIRR "had a right to insist on the maintenance of its existing joint rates" (Pet. App. A 23–24; 487 F. 2d at 182–183).

As a remedy for the unlawful inclusion of LIRR's joint rates in the increase, the court of appeals held that LIRR was entitled to recover from the connecting railroads only such damages as it actually suffered by reason of the unlawful increase in its joint rates. The court reasoned that if it "were to order that the Long Island should collect as damages the difference between what it had to charge as divisions of the joint rate and what its local rates[2] were when the charges were made, the Long Island would receive a windfall without any showing of actual damages."[3] The case was remanded to the district court to determine the

[2] The term "local rates" refers to rates applying solely to traffic on a single railroad's lines. Local rates apply on traffic which is transported only over one railroad's lines, and also on joint-line movements where no applicable joint rate is available. Where a joint rate is applicable it is quoted as one rate to the shipper; each participating carrier takes a share, or "division", of the joint rate. Where no joint rate is available, the total rate for a joint-line shipment is computed by adding together the combination of applicable local rates.

[3] That "windfall", though never precisely ascertained on the record, was generally agreed to exceed $70 million.

amount of any damages to which LIRR might be entitled (Pet. App. A 24–25; 487 F. 2d at 183).

Neither the Commission nor the connecting railroad appellees before the court of appeals sought further review of the court of appeals' decision. LIRR, on the other hand, continued to litigate the question of damages. As the result of a conference before the district court following the court of appeals' remand (at which LIRR maintained that it was entitled to its local rates as the proper measure of damages), petitions for clarification were filed with the court of appeals seeking further amplification of its remand to ascertain damages. Despite the court of appeals' clear ruling that LIRR was not entitled to collect its local rates for the period in which its joint rates were unlawfully increased, LIRR continued to argue that it was so entitled. On March 29, 1974, the court of appeals, in a supplemental opinion (Pet. App. A 28–30; 496 F. 2d 21), held that LIRR "is entitled to any net revenue reduction caused by the increased joint rates to which it objected", and elaborated its formula for the determination of damages.

Following the court of appeals' clarification of the damages issue, LIRR went back to that court, this time with a petition for rehearing of the clarifying opinion. Once again the question of damages, and LIRR's repeated claim that it was entitled to its local rates, were extensively argued. On May 1, 1974, the court of appeals granted rehearing (Pet. App. A 32–33), and in an opinion entered the same day (A 34–36), affirmed its earlier clarifying decision.

On July 29, 1974, LIRR filed the instant petition for a writ of certiorari in this Court.

ARGUMENT

As the principal decision of the court of appeals makes clear, the main point at issue (*i.e.*, whether LIRR took the proper steps to remove itself from the Ex Parte No. 262 increase) was resolved in LIRR's favor. The only remaining issue is the measure of recovery to which LIRR is entitled as a result of this admittedly improper increase, an issue which is unlikely ever to recur, since the nation's railroads and the rate bureaus have ceased any efforts to include LIRR in joint-rate increases over LIRR's objections, and the Commission has authorized no such increase in any order entered since the court of appeals' decision. The court of appeals has properly—and repeatedly—held that LIRR is entitled only to such actual damages as it can prove to have resulted from the unlawful increase, rather than the "windfall" of its local rates for the period of unlawfulness, and there is no occasion for further review of this essentially discretionary determination.

The sole basis for LIRR's alleged right to recover its local rates is the Commission's Rule 52(b) of Tariff Circular No. 20 (Pet. App. B 44; 49 C.F.R. § 1300.52 (b)). Rule 52(b) is a technical rule of tariff procedure outlining the course of conduct to be followed by a carrier which believes itself to have been named in a joint tariff without proper authority. The rule provides that a carrier is bound by the terms of a joint tariff in which it has lawfully concurred.

Where it has not lawfully concurred, it must demand payment under its lawful tariffs and may not seek to collect under the tariff in which it has not concurred. So here, when initially confronted with the Ex Parte No. 262 increase in its joint rates which it believed unlawful, LIRR properly sought to collect under what it contended was its lawful tariff. However, this effort was superseded when LIRR acceded to a stipulation in the district court under which it continued to collect its division of the increased joint rate.

The fact that the court of appeals later held that LIRR had taken proper steps to opt out of the increase does not give rise to an inference that Rule 52(b) entitles LIRR to recovery of its local rates for the period of the effectiveness of the joint rate increases. In essence LIRR argues that a rule of tariff procedure establishes a right to the collection of damages. Such a contention is patently incorrect, and the court of appeals properly rejected it more than once. Nor is there any support for LIRR's assertion that there is a policy behind the rule to punish other carriers when unlawful joint-rate increases are adopted (*e.g.*, Pet., at 11).[4]

[4] The Commission decisions cited by petitioner (Pet., p. 14) do not add substance to this argument. In *St. Louis & O'Fallon Ry. Co.* v. *E.St. L. & S. Ry. Co.*, 81 I.C.C. 538, the Commission found that, where a carrier had been unlawfully *excluded* from a joint rate arrangement but the joint rate for the entire movement was being collected by other carrier participants, those carriers had a duty to pay the excluded carrier the equivalent of its local rates until such time as the tariff was corrected to accord with the law. There is no issue in the pres-

Not only was there no prescribed *statutory* remedy for the wrong which was found—as in *Pollard* v. *Bailey,* 87 U.S. 520—there was no prescribed remedy at all. The court of appeals was thus free—and obligated—to formulate a remedy which is appropriate and equitable in the circumstances. Cf. *Pollard* v. *Bailey, supra.* This the court did, by holding that LIRR is entitled to whatever actual damages it can prove attributable to the harm done. This was an entirely proper action in the premises, and LIRR's continual and repeated objections to the court's remedy reflect nothing more than its desire to get more money from the respondent railroads—four of which, incidentally, are bankrupt.[5]

As earlier stated, the question here presented is not likely to recur, and is thus not a matter of continuing significance meriting plenary review by this Court.[6] In

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ent proceedings of excluding LIRR from collecting its division of the joint rate during the period of its unlawful inclusion in that arrangement, and the *O'Fallon* case is clearly inapposite. *Declaratory Order—Rule 52 of Tariff Cir. No. 20,* 337 I.C.C. 247, is similarly inapposite since it merely reiterates the requirement of Rule 52(b) that a carrier must demand the lawful rate, and says nothing about recovery for past wrongs.

[5] Penn Central, Central of New Jersey, Lehigh Valley and Erie-Lackawanna.

[6] The problem arose in three later general increase proceedings. Ex Parte Nos. 265 and 267, *Increased Freight Rates, 1970 and 1971,* 399 I.C.C. 125, and Ex Parte No. 281, *Increased Freight Rates and Charges, 1972,* 341 I.C.C. 288, all of which were decided prior to the court of appeals' decisions here. As to the combined Ex Parte Nos. 265 and 267 increases, petitioner did not seek judicial review. With respect to the Ex Parte No. 281 increase LIRR did seek review, and a three-judge court in the Eastern District of New York recently entered an order

all increases since the court of appeals' decision the right of LIRR to remove itself from general increases has been observed by the connecting carriers, the rate bureaus, and the Commission,[7] and on this issue the law is now settled. The sole remaining issue of damages has been extensively litigated, and an entirely equitable remedy imposed. There is no occasion for further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

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essentially following the court of appeals' decisions in the instant matter. *Long Island Rail Road Co.* v. *United States, et al.*, Civil Action No. 73 C 310 (E.D.N.Y.) (Order filed July 26, 1974). LIRR filed a notice of appeal from this order on August 9, 1974.

[7] *E.g.*, Ex Parte No. 295, *Increased Freight Rates and Charges, 1973, Nationwide*, 344 I.C.C. 589, and Ex Parte No. 305, *Nationwide Increase of Ten Percent in Freight Rates and Charges, 1974* (preliminary order entered June 3, 1974).

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IN THE

United States Supreme Court

OCTOBER TERM 1974

No. 74-27

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Petitioner,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,

Respondents.

PETITIONER'S REPLY AND SUPPLEMENTAL BRIEF AND MOTION TO CONSOLIDATE

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PETITIONER'S REPLY AND SUPPLEMENTAL BRIEF AND MOTION TO CONSOLIDATE

Petitioner, The Long Island Rail Road Company ("LIRR"), files this reply and supplemental brief and motion to consolidate pursuant to Rules 24(4), 24(5) and 43(5) of the Rules of this Court.

Motion to Consolidate

In the case at bar, LIRR seeks review of the decision and orders of the United States Court of Appeals for the Second Circuit in *Ajayem Lumber Corp.* v. *Penn Central Transportation Co.*, 487 F.2d 179, 496 F.2d 21. The question presented is whether LIRR should, as clearly provided by law, receive its local rates as its compensation for performance of its share of joint-line rail transportation service under *unlawfully* established joint rates, or, as the Court of Ap-

peals held, receive only such damages as it could prove under a formula which simply defies proof. The same question is involved in No. 74-35, *The Long Island Rail Road Company* v. *United States of America, et al.*, which is an appeal as of right under the provisions of 28 U.S.C. §§ 1253 and 2101(b) from the order of a statutory three-judge District Court for the Eastern District of New York in *The Long Island Rail Road Co.* v. *United States, et al.*, —— F. Supp. —— (Civil Action No. 73-C-310, Order filed July 26, 1974).

The petition for a writ of certiorari filed by LIRR herein involves increases in the LIRR's joint rates unlawfully established over LIRR's objections in 1969. Prior to the decision of the District Court on August 23, 1972, LIRR's joint rates were unlawfully increased over its objections two additional times. Subsequent to the District Court decision, the Interstate Commerce Commission ("Commission") approved still a fourth unlawful increase in Ex Parte No. 281, *Increased Freight Rates and Charges, 1972*, 341 I.C.C. 288, decided September 27, 1972.

The fourth unlawful increase in LIRR's joint rates[1] was made the subject of a separate complaint by LIRR before a three-judge statutory District Court[2] for the Eastern District of New York. Shortly after filing its petition for

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[1] In the subsequent general-increase proceedings, beginning with Ex Parte No. 295, *Increased Freight Rates and Charges, 1973, Nationwide*, 344 I.C.C. 589, decided November 16, 1973, LIRR's right of independent action was finally recognized and its joint rates were not increased. The decision in Ex Parte No. 295 was after the Court of Appeals decision sustaining LIRR's position on November 7, 1973, but the Commission was evidently unaware of the decision (344 I.C.C. 594, footnote 2).

[2] The actions in the case at bar were initiated by Ajayem Lumber Corp., an interested shipper, against LIRR and its connecting railroads and by those connecting carriers against LIRR before a single-judge District Court, and LIRR's subsequent third-party plaintiff action was consolidated with those two actions.

a writ of certiorari on July 29, 1974, LIRR learned that the statutory three-judge District Court on July 26, 1974, had granted LIRR's motion for summary judgment, stating that the action in that case "is in all respects governed by the decision of the United States Court of Appeals for the Second Circuit in *Ajayem Lumber Corp.* v. *Penn Central Transportation Co.*, 487 F.2d 179 (1973), . . .". Relying on "absence of jurisdiction," however, the three-judge District Court denied LIRR's request that it be permitted to retain its local rates as its divisions of the unlawful joint rates. A copy of the order of the District Court is reproduced in Appendix A (pp. 16-17).

Since the two cases involve the same question, LIRR moves, pursuant to the provisions of Rule 43(5), that they be argued together as one case, if the Court decides to hear argument, or decided together on the pleadings, if the Court decides oral argument is not necessary.

Reply to the Brief in Opposition of the Interstate Commerce Commission

Throughout these proceedings, counsel for the Commission have kept coming up with new and novel arguments in trying to defend the Commission's actions which, it now seems clear, were recognized as unlawful by all concerned from the start. In the Commission's brief in opposition to the instant petition for certiorari, at least three new arguments are advanced.

In probably its most important new argument, the Commission correctly states that Rule 52(b) is applicable to situations like the present one where a non-concurring carrier's rates are unlawfully increased over its objections. The Commission correctly states (at p. 6):

> "Where it has not lawfully concurred, it must demand payment under its lawful tariffs and may not seek to

> collect under the tariff in which it has not concurred. So here, when initially confronted with the Ex Parte No. 262 increases on its joint rates which it believed unlawful, LIRR properly sought to collect under what it contended was its lawful tariff."

The Commission concedes the Court of Appeals sustained LIRR's position that the increased joint rates were unlawful, and the Commission does not argue that the tariff containing LIRR's local rates is in any way unlawful. The next logical step would obviously be for the Commission finally to admit that LIRR is entitled to collect its local rates out of the unlawful joint rates.

Instead, the Commission makes the following new argument (at p. 6);

> "However, that effort was superseded when LIRR acceded to a stipulation in the district court under which it continued to collect its division of the increased joint rate."

The argument can only be described as incredible.

LIRR argued strongly that it should be permitted to collect its local rates and put the difference between the local rates and its normal divisions in escrow *pendente lite*, but could not convince the District Court to adopt this procedure. As the opinion of the District Court makes clear, the Court obtained "the agreement of the parties to resume service on a *status quo* basis, reserving to the LIRR the right of making a retroactive adjustment if its position was upheld, . . .". (350 F.Supp. 116)

The Commission also evidently overlooked the last paragraph of the District Court's decision, which provided as follows:

> "Therefore, the LIRR is hereby permanently enjoined from refusing to accept freight cars tendered to it upon the presently agreed upon basis of divisions of

joint rates until the Commission makes its final determination in the case of *The Long Island Rail Road Co. v. The Ahnapee and Western Railway Company.*" (350 F.Supp. 121)

The final determination in the case referred to (which LIRR was unsuccessful in convincing the District Court had no bearing on the case at bar) was not effective until October 4, 1973. Evidently, the Commission's position is that in order to preserve its position that it was entitled to the local rates, LIRR should have violated the stipulation and acted in contempt of the District Court.

Thus, the Commission's argument that when LIRR "acceded" to the stipulation in the District Court it gave up its now sustained position that the increased joint rates were unlawful and it was therefore entitled to its local rates, is clearly and completely without any merit whatsoever.

The Commission also argues (at p. 7) that there is no statutory remedy nor prescribed remedy for the wrong found and that Rule 52(b) is merely "a technical rule of tariff procedure." (p. 5)

As was explained in LIRR's petition (at pp. 15-16), Rule 52(b) has the force of law and provides the exclusive remedy. If Rule 52(b) and the other rules and regulations adopted by the Commission in Tariff Circular No. 20 (49 C.F.R. § 1300.00, *et seq.*) do not have the force of law, then all of the recent general freight rate increases have been unlawful in their entirety and not just in regard to those imposed unlawfully upon LIRR traffic.

The present method of making general freight rate increases effective through the use of master tariffs and connecting-link supplements violates the provisions of Section 6(1) and 6(3) of the Interstate Commerce Act, which require that rates be plainly stated, changes be made by publishing new schedules, etc. The short-

form method of publishing general increases used today is made possible by special permission granted by the Commission under the provisions of Rule 58. (49 C.F.R. § 1300.58) If Rule 52(b) does not have the force of law, then neither does Rule 58, and all of the recent general freight rate increases would have to be ruled unlawful. The Commission simply cannot have it both ways.

The Commission questions, on factual grounds, LIRR's reliance on *St. Louis & O'Fallon Ry. Co.* v. *E. St. L. & S. Ry. Co.*, 81 I.C.C. 538, for the proposition that LIRR is entitled to its local rates (pp. 6-7, footnote 4), but that case is only one of many in which the Commission has so held. Where joint rates are unlawfully published and made effective—which is true whether the non-concurring carrier is not shown as a party to the tariff containing the joint rates to or from points on its lines or, as in the present case, is shown as a party without its authority—the Commission has consistently held that the non-concurring carrier is entitled to its lawful rates (usually the local rates).

For example, in *Chelsea Refining Co.* v. *Missouri Pac. Ry. Co.*, 38 I.C.C. 28, the Frisco railroad published a joint rate in connection with the Missouri Pacific, without the latter's authority. The unlawfully published joint rate was 10 cents per 100 pounds, and the Missouri Pacific rate for the short line-haul from the point of interchange to the destination was 7 cents. The Commission held that the shipper was entitled to the unlawfully published 10-cent joint rate, and did not have to pay a combination rate of 17 cents, and then went on to say (38 I.C.C. at 30):

> "In thus holding we are not to be understood as indicating that the Missouri Pacific under such circumstances may accept from the Frisco what the latter line has published as the Missouri Pacific's charge for the service, or that it may lawfully accept from the Frisco any less than its own lawfully published charge. The conclusions reached herein are fully supported by item

68 of Tariff Circular 18-A, and by *De Camp Bros.* v. *V. & S. W. Ry. Co.*, 22 I.C.C., 274; and *Edison Portland Cement Co.* v. *D., L. & W. R. R. Co.*, 22 I.C.C., 382."

We know of no case until now where the Commission or any court has ever held that a non-concurring carrier is entitled or required to accept as its compensation for performing service under unlawfully published joint rates anything other than the rates set forth in its own lawfully published tariffs, which are usually its local rates, and neither the Commission nor the other railroads cite any case where the non-concurring carrier has been forced to resort to an action for damages in lieu of collecting its local rates.

Finally, the Commission argues (at p. 5):

> "The only remaining issue is the measure of recovery to which LIRR is entitled as a result of this admittedly improper increase, an issue which is unlikely ever to recur, since the nation's railroads and the rate bureaus have ceased any efforts to include LIRR in joint-rate increases over LIRR's objections, and the Commission has authorized no such increase in any order entered since the court of appeals' decision."

The Commission's admission that it has "seen the light" and its promise that it will refrain from committing the same unlawful acts in the future—and it should be noted that the respondent railroads make no similar admission and promise in their brief—must be appraised in the light of the known facts, namely, the failure of both the Commission and the other railroads to take the steps necessary to rescind the "admittedly improper" increases still outstanding and applicable to LIRR traffic.

As was shown in LIRR's petition (at pp. 9-11), the formula for damages adopted by the Court of Appeals defies proof, and even if the amount of damages could somehow be determined, they could not be collected from the hun-

dreds of railroads which are not parties to these actions. The Commission and the railroads strenuously defend the Court of Appeals' damage formula, *but neither the Commission nor the railroads make the slightest attempt to argue that the amount of damages could actually be proved or collected.*

Thus, if the Court of Appeals' decision is allowed to stand, the Commission and the railroads in the future could deny with impunity any carrier's right of independent action guaranteed by Section 5a(6), knowing that there would be no penalties for their unlawful acts. Unless this Court reverses the Court of Appeals and holds that LIRR is entitled to its local rates, future similar violations of the law will be encouraged and will be almost certain to occur.

In arguing that LIRR is entitled to collect only damages during the "period of unlawfulness," the Commission evidently seeks to create the impression that the unlawful situation has been corrected. Nothing could be further from the truth. As the Commission correctly stated, the Court of Appeals held that LIRR "was entitled to a hearing before the new joint rates went into effect"; and that until such a hearing might be held, LIRR "had a right to insist on the maintenance of its existing joint rates" (p. 3). Yet, despite all of LIRR's efforts, the railroads have never filed tariffs to restore LIRR's joint rates to the last lawful level, and the Commission has never ordered them to do so. And, the railroads have not petitioned for, and the Commission has not on its own motion instituted, a Section 15(1) investigation and the hearing after which LIRR's joint rates might be lawfully changed. The present unlawfully increased LIRR joint rates remain in effect. Unless this Court reverses the Court of Appeals' holding that the LIRR's remedy is to try to prove damages under an impossible formula, it is unrealistic to expect either the Commission or the railroads to take any action to correct the present unlawful situation or to refrain from similar future violations.

As the Commission states, it has not authorized any further unlawful increases in LIRR's joint rates since the decision of the Court of Appeals. After sanctioning four unlawful increases in LIRR's joint rates, the Commission finally refused to permit a fifth, but this had nothing to do with the Court of Appeals' decision. The Commission's belated recognition of LIRR's right of independent action resulted when the Chessie System in Ex Parte No. 295, *Increased Freight Rates and Charges, 1973, Nationwide*, 344 I.C.C. 589, 595-596, originally indicated an intention to exercise its right of independent action. At the time, the Commission was unaware of the decision of the Court of Appeals (344 I.C.C. at 596). If the railroads and the Commission had thought the only remedy would be an action for damages under an impossible formula, they would have probably again denied the statutory right of independent action to LIRR. If the decision of the Court of Appeals is upheld, there would be no reason for the Commission to have any qualms about doing so in the future.

The simple fact is that under the provisions of the Interstate Commerce Act and the rules and regulations promulgated thereunder, there are only two ways a carrier can be compensated for performing its share of joint-line transportation. Where joint rates have been lawfully established by agreement of all participating carriers or by order of the Commission after full hearing under the provisions of Sections 15(1) or 15(3) (49 U.S.C. §§ 15(1), (3)), each participating carrier gets its agreed or prescribed division of the joint rates. Where no joint rates have been established, each carrier receives its local rates out of the total combination rate, and where, as in this case, joint rates have been unlawfully published, the nonconcurring carrier gets its local rates as its compensation for performance of its share of the transportation under the unlawful joint rates. The Court of Appeals clearly erred in substituting an impracticable formula for computing damages in lieu of the remedy provided by law in this case,

and the Commission's brief in opposition presents no valid arguments to support or defend the action of the Court of Appeals.

Reply to the Brief in Opposition of the Respondent Railroads

In their brief in opposition, the respondent railroads do not address themselves to the issues and arguments made in LIRR's petition. They do not deny that Rule 52(b) has the force of law or that it is the exclusive remedy. They do not contend that anyone could ever accurately compute the amount of damages under the formula adopted by the Court of Appeals (which is essentially the one suggested by the respondent railroads), or that LIRR could collect any damages it could somehow prove from the hundreds of other railroads which are not parties to these actions. Unlike the Commission, the respondent railroads do not even admit that they acted unlawfully, let alone state that the unlawful acts will not be repeated in the future if they would be immune from punishment or penalties, as they would be under the decision of the Court of Appeals.

Instead, they re-hash the irrelevant arguments they made before the lower courts, as to whether LIRR's decision to exercise its right of independent action was wise and whether LIRR had improper motives.[3] These arguments were properly ignored by the Court of Appeals in holding, as even the respondent railroads concede (at p. 3), that "the increase in joint rates was made without proper authority from the Long Island and that, in the circumstances, it was deprived of its right of independent action."

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[3] LIRR's freight traffic fell off sharply since the effectiveness of the unlawful increases in the joint rates and its freight revenues have also declined since 1968, the last year before the unlawful general increases. These facts are immaterial, however, since LIRR has a statutory right to take independent action, whether such action be wise or unwise and for whatever purpose.

Since the respondent railroads did not seek review of the decision of the Court of Appeals, most of their arguments have no bearing on any issue presently before this Court.

The railroads do not deny that, as stated in LIRR's petition (p. 11), the chairman of the principal rate bureau involved had testified that by unlawfully denying LIRR its statutory right of independent action, the Eastern railroads were able to get $100 million annually from the first of the four unlawful increases which they otherwise would not get were it not for their unlawful action. Yet, they argue that for LIRR to collect its local rates, as required by law, would result in a "windfall" for LIRR.

At page 3 of their brief, the railroads argue:

> "Had the Long Island's position been upheld, the result would have been that its divisions would have been trebled and its connecting carriers (most of which are in bankruptcy) would have been required to haul the traffic, or much of it, without receiving anything for the transportation performed by them (439a)."

Page 439a of the record in the Court of Appeals, cited in the above quote from the railroads' brief, is reproduced in Appendix B hereto at page 19, but there is nothing therein to support the statements made. Since local rates would vary greatly, depending on the commodity, origin and destination, etc., it has not been determined by what amount LIRR's local rates would exceed the divisions it would receive out of lawfully established joint rates, but the suggestion that LIRR's earnings would be trebled seems appropriate in view of the treble damages awarded for violations of the antitrust laws. But even if LIRR's local rates were three times its divisions of lawful joint rates, this would not result in the other railroads being required "to haul the traffic, or much of it, without receiving anything for the transportation performed by them," as they claim. In the proceeding referred to in the District Court's

opinions (350 F. Supp. at 121), *The Long Island Rail Road Co.* v. *The Ahnapee and Western Railway Co.*, I.C.C. Docket No. 35153, October 4, 1973 (not printed), LIRR's average division was shown to be less than 15 percent of the total joint rates involved. Thus, even if LIRR's divisions were trebled—and it is extremely doubtful that the local rates would amount to three times the normal divisions—LIRR would still receive less than half of the average joint rates.

In any event, even if LIRR gets its local rates, the other railroads will still be able to keep 90 percent or so of their ill-gotten gains.

Referring to the governing regulation (49 C.F.R. § 1300.52(b)), which is set forth at pages 13-14 of LIRR's petition, the respondent railroads argue (at pp. 3-4):

> "Long Island argues, however, that the aforesaid tariff rule of the Commission requires that it take its local rate as its divisional share of the joint rates. That no such arbitrary result is required is shown by the fact that Long Island concurrently urges the contrary position, i.e., that the taking of its local rates as divisions is required or permitted by the tariff-circular rule upon which it relies (92a)."

It is difficult to understand what it is the respondent railroads are arguing, and an examination of the referred to page 92a of the record in the Court of Appeals (reproduced in Appendix B hereto at page 18), provides little help.[4] The railroads' intended argument may be that at several points during the initial argument before the District Court, counsel for LIRR stated that the use of the word "must" in the governing regulation made it at least permissible, if not absolutely mandatory, for LIRR to collect its local rates as its divisions of the unlawful

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[4] The cited page does, however, make it clear that the issue before the District Court was whether or not LIRR was entitled to its local rates, and not whether or and presented no question of damages.

joint rates. Or, it may be a reference to LIRR's offer in the District Court and the Court of Appeals to retain as its divisions only so much of the local rates, to which it was entitled, as was necessary to eliminate LIRR's freight deficits during the years the unlawful joint rates are in effect, with no profit or return on investment, and to return any balance to the other railroads by means of voluntarily renegotiating the divisions on the past shipments.

As they keep stressing, a few of the respondent railroads (but not the rest of the several hundred carriers from whom LIRR's local rates would be collected) are in bankruptcy in their attempt to generate sympathy. They do not mention that LIRR's freight operations are relatively much more unprofitable, with its total freight revenues running less than half of its freight expenses. There would have been nothing wrong if LIRR had insisted upon collection and retention of the local rates to which it is entitled by law and shown a profit from its freight operations, as do the vast majority of the railroads in the country. However, because of the bankruptcy of some of its principal connections, LIRR stipulated in the courts below that it would retain only so much of the local rates as was necessary to eliminate its freight deficits and forego the rest of the difference between its normal divisions and its local rates, through voluntary renegotiation of past divisions. If such action is to be construed as a voluntary waiver by LIRR of its right to local rates in favor of an action for damages under some undisclosed theory of law against parties not subject to the jurisdiction of the court, then LIRR is perfectly willing to collect and retain all of the local rates.

Finally, the respondent railroads argue (at p. 4):

> "Moreover, the Long Island has been free at any time to restrict the concurrences which it has on file with the Interstate Commerce Commission, thus mitigating its damages. But it never sought to mitigate."

As discussed above, establishment of the unlawful joint rates did not give LIRR the right to sue for damages under some theory of contract or tort, but the right to collect its local rates as its divisions of the unlawful joint rates. Even if the situation were such that LIRR could prove and collect damages which would exceed the difference between its local rates and its normal divisions, LIRR could not bring such an action for damages, since Rule 52(b) clearly provides the exclusive remedy for the violation of law.

So far as seeking to mitigate is concerned, LIRR has sought on several occasions to have the unlawfulness removed by restoring the last lawful level of rates to which it has agreed, which would result in depriving LIRR of its right to collect local rates from that time on, but to no avail. The respondent railroads, on the other hand, have not taken the action available to them to terminate their liability for the local rates.

In its reply brief in the Court of Appeals, the United States, which has supported LIRR below, correctly pointed out (at p. 16):

> "We submit that the procedure which the LIRR followed is the most effective way to compel the agent to file a flag-out. It was the other railroads who countermanded LIRR's instructions, caused the agent to refrain from filing the necessary 'flag-out', and forced a joint rate upon the LIRR over its objections. Requiring those railroads to pay the LIRR its local rates until the appropriate 'flag-out' is filed should provide a sufficient inducement to cause them to change their instructions to TEA-ER. Such a procedure will protect the LIRR's statutory right of independent action without creating any deviation from the formalities which Congress has established for effectuating rate changes. We submit that neither the Commission, the appellee railroads nor the district court has presented any sufficient reason for failing to apply that remedy in this case."

Conclusion

Under the Interstate Commerce Act and the regulations promulgated thereunder, a non-concurring railroad should receive its local rates as compensation for performance of its share of a joint-line movement where joint rates have been unlawfully established over its objections. We know of no provision of law requiring or permitting a carrier to receive its normal divisions plus damages for performance of its share of joint-line transportation, instead of its local rates. The decision of the Court of Appeals does not explain under what theory this could be done, and neither the Commission nor the respondent railroads suggest any.

The case at bar presents a classic example of abuse of the administrative process. If the decision below were allowed to stand, the right of independent action guaranteed in Section 5a(6) would be effectively repealed without any action by the Congress.

For the foregoing reasons and those stated in the petition filed earlier herein, it is respectfully urged that the Court should issue a Writ of Certiorari to review the judgments, orders and opinions of the United States Court of Appeals for the Second Circuit and should consolidate this action with that in No. 74-360, which involves the same questions.

Respectfully submitted,

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Attorneys for Petitioner

September, 1974

Appendix A.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

No. 73-C-310

THE LONG ISLAND RAIL ROAD COMPANY,

Plaintiff,

against

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants,

and

THE BALTIMORE AND OHIO RAILROAD COMPANY, et al.,

Intervenors as Defendants.

ORDER

Plaintiff's motion for summary judgment having come on for hearing on May 28, 1974, before a three-judge panel comprised of the undersigned and designated to hear and determine the issues herein, and the Court having considered the pleadings, memoranda and argument of counsel, and all other matters presented to it;

And it appearing that this action is in all respects governed by the decision of the United States Court of Appeals for the Second Circuit in *Ajayem Lumber Corp.* v. *Penn Central Trannsportation Co.*, 487 F.2d 179 (1973), as subse-

quently clarified and supplemented, and that the motion for summary judgment should therefore be granted to the extent set forth below;

NOW, THEREFORE, it is

ORDERED that plaintiff's motion for summary judgment be and it is hereby granted in part, as follows:

The Orders of the Interstate Commerce Commission entered in its proceeding Ex Parte No. 281, *Increased Freight Rates and Charges, 1972,* 340 I.C.C. 358 (1971); 341 I.C.C. 288 (1972) are hereby vacated, set aside, and annulled to the extent that such orders authorized increases in joint rates on traffic between points on the lines of Long Island Railroad Company and points on the lines of other railroads; and it is further

ORDERED that in the absence of jurisdiction in this Court the application of the Long Island Railroad Company for determination of damages incurred as a result of the application of the Ex Parte No. 281 increase to the rates to and from stations on its line be and it is hereby denied.

LEONARD P. MOORE
Lecnard P. Moore
United States District Judge

JOHN R. BARTELS
John R. Bartels
United States Circuit Judge

MARK A. COSTANTINO
Mark A. Costantino
United States District Judge

Dated: Brooklyn, N. Y.
July 26, 1974

Appendix B.

Transcript of Hearing, December 16, 1969

The Court: Yes. I so direct both of you gentlemen to contact the I. C. C.

Mr. Kaier: I'll be happy to do it, too. I can't do it tomorrow, though, but Mr. Murphy can go down tomorrow.

Mr. Murphy: I can.

The Court: Off the record.

(Discussion off the record.)

The Court: What would you put up to the Commission? What would be the issue?

Mr. Kaier: As I understand it, it is whether the Long Island is now – may now or must now collect its local rate on interline traffic.

Mr. Hoffmann: May I add to that?

Mr. Myskowski: As its division.

Mr. Hoffmann: And withhold it.

Mr. Kaier: You haven't said that.

Mr. Hoffmann: And withhold it from our money.

Mr. Kaier: All right, as its division.

(83) The Court: It is a good thing I practiced law at one time.

Mr. Myskowski: We are getting our case cornered in here, your Honor.

The Court: I know.

Let me ask you this: Is this going to be—

Mr. Kaier: Pardon me, your Honor.

The Court: Will this be a decision on the merits?

Mr. Kaier: I think it would be just a decision on that principle.

The Court: It would simply be a temporary adjudication? I mean, for a temporary situation, not on the merits at all; would it?

Mr. Myskowski: That's right, your Honor. It would govern until the Commission finally decides *ex parte* 262, which is the six per cent increase rate.

The Court: They have not decided that yet?

backing up in some cases beyond the borders of Eastern Territory. A significant example would be the effect on the eastbound transcontinental rate on lumber. A blanket rate applies to all stations from Group D (Chicago area) to the Atlantic Ocean. At the Ex Parte 259 level that rate is $1.51 per 100 lbs. At the Ex Parte 262 level it is $1.60. If a $1.51 rate is restored to all Long Island stations, that rate will have to be reinstated also all the way back to the western boundary of Group D, west of Chicago. As to other commodities, the same would be true as far west as Pittsburgh, Pa. on traffic to and from transcontinental territory. Also, the same problem would exist in connection with interterritorial rates to and from the south.

In my opinion, maintenance of lower rates to and from the Long Island's stations in the New York rate group than would apply to and from other stations in the New York rate group would be destructive of the rate structure and would cause a loss of large sums of money to the railroad industry, affecting the revenues of the Long Island's direct connections most seriously. Exemption of the rates to and from the important part of the New York metropolitan area served by the Long Island from the 6 percent increase would place such stress on the rate structure as to cause exemption of the increase from other rates. I am convinced that if